American Navigation Co. *and* Edson Adams. Case 20-CA-14745

20 December 1983

SUPPLEMENTAL DECISION AND ORDER

On 30 October 1980 the National Labor Relations Board issued an Order in this proceeding in which it adopted an administrative law judge's findings and conclusions that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Edson Adams because of his union activities, and adopted his recommended Order directing the Respondent, inter alia, to make Adams whole for any loss of pay caused by the Respondent's discrimination against him.[1] Thereafter, the Board's Order was enforced on 24 September 1981 by the United States Court of Appeals for the Ninth Circuit in an unpublished Order,[2] and the court entered its Judgment enforcing the Board's Order on 12 November 1981. Subsequently, pursuant to a backpay specification and notice issued by the Regional Director for Region 20, a hearing was held before Administrative Law Judge Michael D. Stevenson to determine the amount of backpay due the discriminatee. On 15 November 1982 the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the supplemental decision.

The Board has considered the record and the attached supplemental decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent herewith.

The judge found that discriminatee Adams had concealed from the Board certain earnings he had received during the backpay period. This finding was based on Adams' admission that he told Captain Don Fuller, an official of the Masters, Mates & Pilots Union, that he had been employed for some 2 to 4 weeks rebuilding engines for minimal wages sometime after his termination from the Respondent in July 1979 and prior to his employment with Tidex, International in the fourth calendar quarter of 1979. The judge discredited Adams' denial of the interim earnings related in Fuller's testimony. Moreover, the judge termed "preposterous, inherently untrue and absurd" Adams' explanation that he had made these statements to Fuller only to see if Fuller could be trusted to keep information confidential. Thus, the judge concluded that Adams had been employed rebuilding engines and had concealed this and the amounts he had earned from that employment from the Board.

In considering whether Adams should be penalized for this concealment, the judge considered the Board's precedent in dealing with this issue. He noted that in *Big Three Industrial Gas*, 263 NLRB 1189 (1982), and in *Flite Chief, Inc.*, 246 NLRB 407 (1979),[3] the Board had awarded backpay to discriminatees who had initially concealed interim employment, but who had subsequently admitted the employment. He noted that in *Big Three*, supra, the Board found that, notwithstanding the initial concealment of earnings, there was no fraud or deceit on the Board or the public because the discriminatee's belated admission enabled the Board to determine accurately the backpay owed. Accordingly, the Board had refused to penalize the discriminatee. The judge concluded, however, that the rationale of these two cases was not fully applicable to the instant case because Adams had never disclosed the concealed employment. He indicated, instead, that the disposition of the instant case was controlled by the rationale of *Great Plains Beef Co.*, 255 NLRB 1410 (1981), and *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964). In these two cases, the Board denied all backpay to discriminatees who had persisted in their concealment of earnings where the Board also found that their deception constituted an abuse of the Board's processes and rendered impossible the ascertainment of their interim earnings. Relying on these two cases, the judge found it necessary to adjust the amount of backpay awarded to Adams. However, he found that Adams should not be completely denied backpay as were the discriminatees in *M. J. McCarthy* and *Great Plains Beef*. He found that, unlike those discriminatees, Adams' concealment did not appear to affect the entire backpay period but only a portion of it and, applying a theory that is compatible with the Board's *Big Three* and *Flite Chief* decisions, he found that Adams' backpay should be reduced only by the amount of the concealed earnings, as estimated.

The judge noted that the exact amount could not be determined due to Adams' lack of candor. However, based on Captain Fuller's testimony as to what Adams had related about his interim employment, and, indicating that he was resolving all uncertainties against Adams, the judge found that the unreported earnings "likely" occurred in the third quarter of 1979, and estimated that they were for a period of 4 weeks at a salary of $25 a day.[4] Be-

[1] The Board's Order was unpublished.

[2] *NLRB v. American Navigation Co.*, No. 81-7560.

[3] Enf. denied in pertinent part 640 F.2d 989 (9th Cir. 1981).

[4] The salary of $25 a day was arrived at from Adams' telling Fuller that he had earned minimal amounts while rebuilding engines and also

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cause the record afforded no basis from which to infer any expenses, the judge found that Adams had no expenses for this quarter. Thus, he concluded that Adams had $500 of unreported income for the third quarter of 1979 and, consistent with *Big Three* and *Flite Chief*, he subtracted only this amount from the net backpay due for that quarter. Accordingly, the judge found Adams entitled to $14,945.99, plus interest, less applicable tax withholdings, plus $2,248.95 in pension contributions.

The Respondent argues that the judge's award of backpay to Adams was erroneous and contends that Adams should be denied all backpay because his concealment of earnings amounted to a fraud on the Board and the public. Alternatively, the Respondent urges that Adams should be denied backpay at least for the third quarter of 1979, the quarter in which the judge found it was "likely" that he had received the unreported earnings. The General Counsel argues in response that any further diminution in Adams' backpay would be contrary to the principles set out in *Flite Chief* and *Big Three.*

We agree that Adams' backpay award should be adjusted to a greater extent than that found appropriate by the judge. We thus decide today, consistent with Member Zimmerman's concurring and dissenting opinion in *Big Three*, that discriminatees found to have willfully concealed from the Board their interim employment will be denied backpay for all quarters in which they engaged in the employment so concealed. Accordingly, we hereby overrule *Big Three* and *Flite Chief* to the extent they are inconsistent with this view.

In *Big Three* and *Flite Chief* no penalties were imposed on discriminatees who initially concealed certain interim income, but who subsequently admitted the earnings. In *Flite Chief*, the claimant disclosed these earnings to a Board representative on the day that the backpay hearing commenced; in *Big Three*, the claimant admitted the earnings while he was on the witness stand undergoing questioning by the employer's counsel. In both of these cases, the Board awarded the claimants backpay as reduced only by the amount of the belatedly admitted interim earnings.

In *Big Three* the majority agreed with the General Counsel's contention that the concept of a penalty has no place in the national labor law scheme because the Act is remedial, not punitive, in nature. The majority stated that the Board fulfills its obligation to the public not in condoning a claimant's failure to report earnings, but in recognizing that accurate reporting is not always possible. The majority then noted the difficulty in keeping accurate records of interim employment where discriminatees often hold many short-term jobs over lengthy backpay periods. In these circumstances, the majority said it was reluctant to require administrative law judges to speculate about whether a claimant's failure to report earnings was due to an honest error or a fraudulent intent. The majority then concluded that, even when interim earnings are unreported, when the actual amount of backpay owed can be determined, there is no fraud or deceit on the Board or the public, and therefore a penalty is inappropriate. Similarly, the Board concluded in *Flite Chief* that a claimant's initial concealment of earnings had not undermined the Board's remedial processes and that a penalty would be inappropriate when the claimant had voluntarily admitted, albeit at the eleventh hour, the earnings he had previously concealed.

In disagreeing with the rationale of the above two cases, we initially note that Section 10(c) of the Act empowers the Board in remedying unfair labor practices "[t]o take such affirmative action, including reinstatement of employees, *with or without backpay*, as will effectuate the policies of the Act [emphasis added]." And, as the Supreme Court has recently recognized, the Act does not require the Board to "reflexively order" complete relief for every unfair labor practice. Rather, the Board, within its discretion, may determine whether a particular remedy will effectuate the policies of the Act. *Shepard v. NLRB*, 103 S.Ct. 665 (1983). Thus, it is clear that a discriminatee is not automatically entitled to an award of full backpay by virtue of his illegal discharge. The question of whether this remedy should be awarded depends on our determination that such an award is necessary to effectuate the policies of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).[5] Thus, our decision to deny backpay, wholly or partially, cannot reasonably be construed to be a "penalty" that is inconsistent with the nonpunitive nature of the Act. As the Ninth Circuit noted in *Flite Chief*, 640 F.2d at 992, "Calling it a penalty, or a remedy, or a diminution or a set off, or an abatement is not the test. The test is does it effectuate the policies of the Act."

while picketing for the Security Officers Union. This latter employment was reported to the Board at a listed salary of $25 a day, so the judge used the same figure for the concealed employment.

[5] To that end, we underscore the Supreme Court's comments over 40 years ago in *Phelps Dodge* that:

> [W]e must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. [313 U.S. at 198.]

We think that in fashioning a remedy in cases where a discriminatee has intentionally concealed employment from the Board, two matters must be considered: (1) the Respondent's liability for the consequences of its unlawful conduct, and (2) the Board's administration of its compliance proceedings consistent with the public interest. Each of these matters is equally important. As the Ninth Circuit reasoned in *Flite Chief*, supra at 993, to award full backpay to a claimant who attempts to pervert an order issued in the public interest into a scheme for unjustified personal gain is to reward perfidy. This hardly enhances the public interest or effectuates the Act. Yet, the Board holdings in *Big Three* and *Flite Chief* unintentionally achieve just such an inequitable result, and it is for this reason that these holdings must be overruled. We note that an award of full backpay in these circumstances not only rewards the specific individual's perfidy, but may also encourage deceit by others in the future, because claimants will know that they have nothing to lose by concealing employment. If the concealment is undetected, the claimant enjoys a windfall; if detected, he suffers no loss but forgoes only the amount of concealed earnings, an amount to which he was not entitled in any event.

On the other hand, to deny backpay in an amount that exceeds that which is necessary to deter deception is to provide a respondent with an unjustified windfall and to permit it to avoid the consequences of its unlawful conduct for no useful purpose. We find that a remedy which denies backpay for the quarters in which concealed employment occurred will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondents from committing future unfair labor practices.[6] This remedy will be applied, of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings.[7]

Applying these principles to the facts of the instant case, we conclude that Adams must be denied backpay for both the third and fourth quarters of 1979. While the judge found that Adams' concealed employment "likely" occurred in the third quarter, it is impossible to determine whether this employment occurred in the third or fourth quarter or portions of both. Thus, according to the testimony of Captain Fuller, Adams said that the concealed employment occurred in the interim between his discharge from the Respondent and his obtaining employment with Tidex, International. Because Adams' employment with Tidex commenced sometime during the fourth quarter of 1979, it is possible that the concealed employment occurred at the beginning of the fourth quarter, and it is also possible that it occurred in the third quarter as the judge found "likely." Of course, a third possibility is that it spanned both quarters. Because we cannot determine that the concealed employment occurred in one particular quarter, and we are unwilling to accept the judge's assessment based on likelihood, we shall deny all backpay claimed for both quarters. While it may seem harsh to deny Adams backpay for two quarters for his concealing at most 4 weeks of employment, the uncertainty as to the appropriate quarter is directly attributable to Adams' failure to be candid with the Board.

While we deny backpay for these two quarters, we will not similarly deny Adams the pension contributions claimed for these two quarters. Pursuant to its collective-bargaining agreement with the International Organization of Masters, Mates & Pilots, the Respondent is obligated to make monthly pension contributions to the Columbia River Trust Funds on behalf of employees employed in the collective-bargaining unit. Following Adams' unlawful termination, the Respondent made no contributions into this fund on Adams' behalf. We note here that the interruption of contributions into a specific pension fund may cause a loss which manifests itself in the future when an individual otherwise entitled to retire is unable to do so because of the lapse in contributions. Accordingly, a unique benefit flows from longevity in a specific pension fund that cannot be duplicated by contributions into another pension fund. Thus, even assuming that Adams' unknown interim employer contributed into another pension fund on his behalf, Adams would not thereby have received a pension benefit exactly equivalent to that lost when the Respondent unlawfully terminated him, and he would not, in seeking pension contributions from the Respondent, be claiming a benefit to which he is not entitled. Absent evidence, not present here, that Adams concealed contributions into the fund provided by the Respondent, we find that Adams is entitled to the pension contributions claimed. Because our twin purposes here are to deter deceit

[6] In accord with *M. J. McCarthy*, supra, and *Great Plains Beef*, supra, we will continue to deny all backpay to claimants whose intentionally concealed employment cannot be attributed to a specific quarter or quarters because of the claimant's deception.

[7] We are fully confident that administrative law judges are capable of distinguishing honest error from deceit based on their reasoned evaluation of objective criteria. Of course, administrative law judges are entrusted to make reasoned evaluations of witnesses' credibility, and the Board places great reliance on these credibility findings. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We find no reason to presume, as did the majority in *Big Three*, that administrative law judges would "speculate" rather than reasonably evaluate whether a claimant's failure to report earnings resulted from an honest error or from a deceitful intent.

and to deter the commission of unfair labor practices, and because there is no evidence that Adams deceived the Board regarding this matter, we find that neither purpose would be served by denying him the pension contributions in question. Instead, this would result only in an unjustified windfall to the Respondent.

Accordingly, by adjusting the backpay in the manner discussed above, we conclude that Adams is entitled to payment by the Respondent in the sum of $5,713.78, plus interest accrued to the date of such payment,[8] less tax withholdings required by state and Federal law. We further conclude that Adams is entitled to have paid by the Respondent the sum of $2,248.95 in pension contributions on his behalf.[9]

ORDER

The National Labor Relations Board hereby orders that the Respondent, American Navigation Co., San Francisco, California, shall pay and contribute the following, plus interest, to and on behalf of Edson Adams:

Back Wages:	$5,713.78
Pension Contributions:	2,248.95

[8] See *Isis Plumbing Co.*, 138 NLRB 716 (1962); *Florida Steel Corp.*, 231 NLRB 651 (1977).

[9] See *Ogle Protection Service*, 183 NLRB 682 (1970); *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge: This supplemental proceeding was heard in San Francisco, California, on July 8, 1982. The backpay specification and notice of hearing were based on the Decision and Order of the Board dated October 30, 1980. (Unpublished.) (G.C. Exh. 2(b).) The Order of the Board was enforced by the Ninth Circuit Court of Appeals on November 12, 1981. (Unpublished.) (G.C. Exh. 2(c).)

At the hearing of the instant case, the Respondent effectively admitted the gross backpay and the expenses as computed by the General Counsel's compliance officer. The appendix to the backpay specification reflecting the specific computation was admitted into evidence without objection. (G.C. Exh. 2(d).) It reads as follows:[1]

Yr./Qtr.	*Gross Backpay*	*Interim Earnings*	*Expenses*	*Net Interim Earnings*	*Net Backpay*	*Pension Contributions*
1979 III	$4687.41	$ 125[1]	$300.00[3]		$4687.41	$387.15
1979 IV	5737.00	1184[2]	491.80[4]	$692	5044.80	435.00
1980 I	7406.00	3586[2]		3586	3820.00	435.00
1980 II	6682.00	7820[2]		7820		435.00
1980 III	6763.50	7820[2]		7820		435.00
1980 IV	1893.78				1893.78	121.80

Total Backpay Principal: $15,445.99

Total Pension Contributions: $2,248.95

[1] International Organization of Security Officers
[2] Tidex International
[3] Mileage, phone calls
[4] Mileage, lodging

After receipt of the backpay specification, including the appendix, the General Counsel rested. Thereafter, the Respondent presented certain evidence. This evidence, together with the General Counsel's rebuttal evidence, is summarized below.

Issues

(1) Whether the Charging Party willfully failed to state all of his interim earnings with an intent to increase by fraud the amount of backpay due him.

(2) If he did, what effect, if any, will said fraudulent act or omission have on the ultimate award of backpay.

The Facts

Edson Adams, age 41, was formerly employed by the Respondent as a deckhand. In that capacity, Adams was liable to be called to work at any time, 7 days a week, 24 hours a day. Generally, he maintained contact with his Employer by telephone. Since 1964, Adams has also been a member of the U.S. Coast Guard Reserve. His service has involved at least one segment of active duty and, for the last several years, 1 weekend per month and 14 continuous days per year. While employed by the Respondent, Adams was not paid by the Company during his reserve service. During part of the backpay period, Adams continued his reserve duty earning approximately $60 to $65 per month.[2]

Adams did not report his Coast Guard earnings, such as they were, to the Board as interim earnings. However, Adams did hold certain conversations with his father, a local attorney, who died a few days before the hearing. Sometime before his death, Adams' father contacted counsel for the Respondent and reported that his son had forgotten to report to the Board certain additional interim earnings. It is unclear whether attorney Adams was referring to the Coast Guard earnings or the earnings from other alleged interim employment not reported to the Board.

[1] Adams had returned to work at the Respondent several months before the hearing.

[2] For those periods of time when Adams was working for other companies outside the United States, he did not attend reserve meetings as scheduled. Upon his return to the United States, Adams was permitted by the Coast Guard to make up without pay the missed meetings. The purpose of attending the unpaid makeup meetings was to continue accumulating retirement credits.

Adams was called as a witness by the Respondent. He detailed his considerable efforts to locate employment both locally and elsewhere during the relevant period of time.[3] Adams was to be recalled by the General Counsel on rebuttal.

As its second witness, the Respondent called Captain Donald Fuller, an official of the Master, Mates & Pilots Union (MMP). Adams was a member of this Union while employed at the Respondent. Fuller held a position in the Union comparable to that of a business agent, and, when Adams had been originally discharged by the Respondent, Fuller expended some effort in attempting to get Adams rehired. According to Fuller, Adams contacted him at the union hall sometime in October or November 1980. Adams allegedly told Fuller that he had been able to find work outside the maritime industry with two employers. One of these was picket duty for the Security Officers Union earning $25 per day. The other was as a mechanic's helper rebuilding engines in Stockton, California. The work as a mechanic's helper lasted about 2 weeks or a month and the earnings for both jobs were minimal. Adams never said exactly when he had performed this work, but it was before he went to work for Tidex. Fuller went on to say that Adams made several references, over the next year, to his employment situations described above.

In rebuttal, Adams was recalled. He admitted a single conversation with Fuller after several of Adams' friends and acquaintances had warned him that Fuller could not be trusted to keep information confidential, even when requested to do so. According to Adams, he decided to test this theory by giving Fuller certain false information to see how long it would be before it would get back to Adams that Fuller had broken the confidence. Adams told Fuller that he, Adams, had received additional income by working for a friend in Stockton rebuilding engines. Adams went on to testify that within a month his worst fears were realized; he learned from a third party that Fuller had indeed broken the confidence, just as several of Adams' friends allegedly had predicted. The third party who had conveyed the confidential information back to Adams was allegedly John Droeger, the Respondent's counsel at the hearing.

Adams' testimony is so preposterous and inherently untrue that I would discredit it on its face. That is, it is self-impeaching due to its absurdity.[4] Yet the record yields even more to discredit the rebuttal testimony of Adams regarding his motive for giving false information to Fuller. For example, on cross-examination, Adams was asked certain relevant and material questions. Note the evasive, contradictory, and inconsistent manner of his responses:

> Q. Who were the persons who had warned you not to confide in Captain Fuller?
>
> A. I think that I would like some advisement on that. I would like to keep that confidential information.
>
> JUDGE STEVENSON: Well, there is no objection from any attorney, so all that I can do is ask you to answer.
>
> THE WITNESS: Would you repeat the question?
>
> Q. (By Mr. Droeger) Who were the persons who you say warned you against confiding in Captain Fuller?
>
> A. I am unable at this time to recall specifically which occasion and which people said this to me. It would be as if you went to a party and a guy would say to me, "Oh, that is a great girl!", or something like that, I don't remember—
>
> Q. (Interrupting) If you can't remember now, Mr. Adams, why did you object to giving the answer a few seconds ago?
>
> A. The specific people who have warned me are not totally recallable by me at this time. It was a general consensus of opinion amongst a number of people.
>
> Q. The question pending, Mr. Adams—you have not responded to it, and maybe you can help me with it—if you can't recall these people why did you ask the Administrative Law Judge to protect you from having to answer?
>
> A. I can't be accurate in naming each and every person.
>
> Q. Well name the ones that you can remember, sir.
>
> A. I can remember Roger Yurgen (phonetic); I can remember a gentleman named Ceaser, and I can't recall his full name; and I can remember a gentleman named David Cronin; and I can remember a man named Captain Don Grant. Off the top of my head that is all that I can recall. [R. Br., pp. 58-59.]

After finally learning the names of the alleged speakers,[5] counsel for the Respondent asked for details as to places and dates of conversations. Adams was vague and evasive here as well. Then counsel inquired as to what was said. Here Adams became more consistent. I am asked to believe that each speaker, talking to Adams alone, said, "Be careful," apparently with reference to Fuller.

The final witness at the hearing was attorney Droeger, who swore that he never discussed with Adams any information about Adams having worked in Stockton rebuilding engines. In fact, Droeger had learned this information from a fellow employee of Adams who was unnamed. Naturally, I credit Droeger's testimony and disbelieve still another aspect of Adams' testimony.

Analysis and Conclusions[6]

Earnings from the U.S. Coast Guard Reserve

All agree that Adams had some interim earnings from the Coast Guard Reserve during the relevant period

[3] Since there is no issue regarding a failure to mitigate damages, none of the names of specific companies nor the specific locations is particularly relevant to the instant case.

[4] *Plasterers Local 394 (Burnham Bros.)*, 207 NLRB 147 fn. 2 (1973).

[5] One of these was in the Navy; the status of the other three is not reflected in the record.

[6] There is no issue regarding Adams' interim earnings for picket duty. The appendix, above, shows that in third quarter of 1979 Adams earned $125 performing picket duty for the International Organization of Security Officers. The Respondent does not dispute this fact. (R. Br., p. 79.) Accordingly, this matter will not be discussed further.

which were not reported to the Board. The exact amount cannot be determined on this record. However, in light of my ruling, the lack of specificity will have no effect. I find that Adams' participation in the U.S. Coast Guard Reserve was a supplemental job held by Adams during his initial employment by the Respondent. There is no evidence that Adams devoted more time during the backpay period than he would have done absent the discrimination against him.[7] Accordingly, the wages earned from the Coast Guard during the backpay period are not deductible from gross backpay as interim earnings.[8]

Earnings from a Job Rebuilding Engines in Stockton

It is a relatively simple matter on this record to discredit Adams as to why he made the statement in issue to Captain Fuller. It is somewhat more difficult to evaluate what is left after his explanation has been discredited. I must evaluate Adams' admitted statement to Fuller in light of common sense and human experience. I must also consider the fact that Adams' claim of deliberate falsehood to Fuller and his alleged motive for the falsehood are demonstrably false. In this context, I must conclude that Adams made the statement to Fuller because it was true. I find it was true because there is no apparent reason for Adams to have made a false statement.[9] In sum, I find that Adams had unreported earnings as a mechanic's helper in Stockton for about 2–4 weeks.

At this point, I should review the relevant rules established by the Board and the courts with respect to backpay proceedings. The General Counsel having established gross backpay, the Respondent has the burden to establish affirmative defenses that would mitigate its liability.[10] The Respondent must also establish, among other matters not here relevant, interim earnings to be deducted from the backpay awards.[11] Any uncertainties or ambiguities should be resolved in favor of the wronged party, Adams, rather than the wrongdoer, the Respondent.[12]

From the general rules quoted above, I turn next to a recent case which directly affects the central issue in this case. This central issue can be framed as follows: What effect, if any, does Adams' continuing failure to reveal all of his interim earnings have on the Respondent's backpay liability? In *Big Three Industrial Gas*, 263 NLRB 1189 (1982), the Board had occasion to consider a similar, but not identical, issue. There, the discriminatee did not disclose substantial interim earnings he had received during a portion of the backpay period until counsel for the respondent questioned him about those earnings on the witness stand during the backpay hearing. The administrative law judge compared the discriminatee in that case to the discriminatee in another case titled *Flite Chief, Inc.*, 246 NLRB 407 (1979), enf. denied in part 640 F.2d 989 (9th Cir. 1981). In the latter case, the discriminatee waited until the "11th hour" just before the hearing before providing all relevant earnings information. Contrary to the administrative law judge in *Flite Chief*, the Board held that the discriminatee should not be penalized.[13]

The administrative law judge in *Big Three Industrial Gas* attempted to distinguish *Flite Chief*, and recommended that the discriminatee in his case should suffer "a penalty" for not revealing some of his interim earnings to the Board. As it did in *Flite Chief*, the Board also reversed the administrative law judge and held that the discriminatee should be made whole without deduction or penalty.

I have reviewed carefully the Board's decision in *Big Three Industrial Gas*. In attempting to determine its application to the instant case, I remain circumspect in light of the rulings by the administrative law judge in that case and in *Flite Chief*, both of which rulings the Board held to be in error.

In the two cases referred to above, there was full disclosure by the discriminatees although untimely. The Board's view, however, is not to look to the time of disclosure, nor even apparently whether there is full disclosure, but rather another factor. In *Big Three Industrial Gas*, the Board stated (at 1190):

> Even in situations where all interim earnings are not reported to the Board's Regional Office, no fraud or deceit on the Board or public is deemed to have been committed so long as the Board can determine with accuracy the backpay owed a discriminatee.

The Board went on to suggest that it is difficult for an administrative law judge to speculate about a discriminatee's motive, since the omission may have been the result of inadvertent error, poor record keeping, or the like. This concept applies where a discriminatee supplies the necessary information, albeit late, but it does not apply where the discriminatee never supplies the information, and even denies that such information exists at all, as Adams has done here.[14]

In any event, I find that in this case the Board cannot determine with accuracy the backpay owed to Adams. So notwithstanding that the Respondent is the wrongdoer and has caused substantial economic injury to Adams, and notwithstanding that a public rather than a private right is at stake, I find that an adjustment to Adams' backpay is required. As authority for my ruling, I look to the Board's holding in *Great Plains Beef Co.*, 255 NLRB 1410 (1981), and *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964). In both of these cases, no "11th

[7] Indeed, there is reason to believe that Adams earned less money at his supplementary job during his backpay period. While working outside the United States, Adams did not attend his regular reserve meetings for which he would have been paid. When Adams was permitted to make up his missed meetings, it was on a nonpay basis for retirement credits only. I express no opinion as to whether Adams deserves to be made whole for this reduction since the parties did not fully litigate the matter, nor was it put into issue.

[8] *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157–58 (1980).

[9] Adams' statement in question is an admission by a party opponent. Fed.R.Evid. 801(d)(2).

[10] *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963).

[11] *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812–813 (5th Cir. 1966).

[12] *United Aircraft Corp.*, 204 NLRB 1068 (1973).

[13] Since the Board has disagreed with the Ninth Circuit in *Flite Chief*, I am, of course, bound to accept the Board's view of the law.

[14] Moreover, Adams referred during his testimony to carefully kept diaries reflecting notations about all of his interim employment except the job in Stockton. This omission strongly suggests, in the context of his case, a carefully laid plan to defraud the Employer.

hour" disclosures were made. Rather, an employee initiated, and persisted in, attempts at deception by evasiveness and other methods. This is exactly what Adams has done here.

The final question is just how Adams' backpay should be adjusted. Unlike the two cases cited above, Adams' deception was not of such a type as to defeat in toto his right to backpay. Rather, the unreported interim earnings will affect, so far as I can determine, only a single quarter. The amount of unreported interim earnings cannot be determined with certainty due to the failure of Adams to be candid with the Board. I will resolve all uncertainties and ambiguities against Adams as the person responsible for creating them and use certain reasonable assumptions to fashion a fair and proper remedy. According to Fuller, Adams said he worked for a period of 2–4 weeks before going to work for Tidex. Thus, I look to the third quarter of 1979 as the likely time period to make an adjustment and will assume Adams worked for 4 weeks. The record does not reveal Adams' salary. However, he did characterize his salary as "minimal" referring both to Stockton and to certain picket duty for which a salary was stated. Adams earned $25 per day on picket duty and I will assume that rate of pay as his salary as a mechanic's helper in Stockton. Since the record contains no basis to make reasonable assumptions relative to expenses, I will decline to find expenses for the quarter at issue. Applying these figures to the backpay computation, I find that Adams had unreported interim earnings of $500 for the 4 weeks in issue. I subtract that figure from the original net backpay due for the third quarter of 1979 and find a new figure of $4,544.80. By adjusting the total backpay principal accordingly, I find and conclude that Edson Adams is entitled to payment by the Respondent of the sum of $14,945.99, plus interest thereon accrued to the date of such payment,[15] less tax withholdings required by state and Federal laws I further find and conclude that Adams is entitled to have paid, as alleged, the sum of $2,248.95 in total pension contributions.

[Recommended Order omitted from publication.]

[15] See *Isis Plumbing Co.*, 138 NLRB 716 (1962); *Florida Steel Corp.*, 231 NLRB 651 (1977).